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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS JOHN PATTERSON, *et al.*

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QUESTIONS PRESENTED

1. Whether a seniority system instituted by an employer and union after the effective date of Title VII is protected by § 703(h) where the system perpetuates the employer's and the union's own prior intentional discrimination.

2. Whether a requirement of prior service in a line of progression, imposed as a prerequisite for eligibility to bid on higher-rated jobs in the line, is part of a "seniority system" within the meaning of § 703(h) where satisfaction of the requirement is not determined by any measure of time served in employment.

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AMERICAN BRANDS, INC.,

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On Writ Of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

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BRIEF FOR RESPONDENTS JOHN PATTERSON, ET AL.

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STATEMENT OF THE CASE

These consolidated employment discrimination cases concern the application of

§ 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), to seniority systems or lines of progression instituted after the effective date of the Act.

A. Proceedings Below

This litigation began in 1969, when John Patterson and other black employees filed administrative charges alleging discrimination by the company[1/] and the union[2/] at three American Tobacco Company

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1/ In this brief, "company" refers collectively to the American Tobacco Company, a Division of American Brands, Inc., and to American Brands, Inc.

2/ In this brief, "union" refers collectively to the Tobacco Workers International Union and Local 182, Tobacco Workers International Union. The brief for the union petitioners states that, in 1978, the Tobacco Workers International Union merged with the Bakery and Confectionary Workers International Union to form the present

facilities in Richmond, Virginia. (App. 6).[3/] In 1973, the employees filed a class action in the district court, charging the company and the union with racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. (App. 2-3). This action was consolidated for trial with a subsequent Title VII action, filed by the Equal Employment Opportunity Commission, alleging both race and sex discrimination.

2/ cont'd.

Bakery, Confectionary and Tobacco Workers International Union. Brief at 1 n.1.

3/ In this brief, "App." refers to the joint appendix filed in this Court; "J.A." refers to the joint appendix filed in the court of appeals; "Ex. App." refers to the joint exhibit appendix filed in the court of appeals; "Tr." refers to the trial transcript; and "Pl. Ex." refers to plaintiffs' trial exhibits.

(App. 3).

Following the trial in 1974, the district court found that the company and the union engaged in intentional race and sex discrimination until 1968; that thereafter they continued to discriminate against black and female employees in seniority, promotions, and job classifications; and that the company also discriminated against blacks and women in the selection of supervisors. (App. 7-11). The Fourth Circuit affirmed these findings in 1976 (App. 75-78, 93-94, 96-97),[4/] and this Court denied certiorari. (App. 108).

4/ The Fourth Circuit also affirmed, with some modifications, the relief ordered by the district court (App. 78-92, 94, 97-104), but held that the EEOC's complaint against the union for sex discrimination should be dismissed due to the EEOC's failure to attempt conciliation before filing suit. (App. 94-96).

On remand, the company and the union filed a motion to vacate the district court's 1974 orders and to dismiss the complaints on the basis of this Court's 1977 decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324.[5/] On appeal from the district court's denial of this motion, a majority of the Fourth Circuit panel held in 1978 that the case should be remanded for further findings on whether the seniority system was protected from Title VII liability by § 703(h) as interpreted in Teamsters.

5/ The motion also sought dismissal of the complaints on the basis of United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), and Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). The Fourth Circuit en banc affirmed the district court's denial of the motion on the Evans issue and remanded the Hazelwood issue for further consideration. (App. 146-53). No petition for certiorari was filed with respect to these issues.

(App. 117-18). The panel majority excluded from the scope of this remand all non-seniority aspects of the challenged promotional practices, including the use of lines of progression. The panel held that § 703(h) could not immunize these lines of progression from liability because they were not part of a "seniority system" within the meaning of the statute. (App. 116).

On rehearing en banc, the majority agreed with the panel that Teamsters required a remand for additional proof and a new determination on the bona fides of the seniority system. (App. 145-46).[6/] However, the en banc majority did not reach the question whether the lines of progres-

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6/ No petition for certiorari was filed with respect to this issue.

sion were part of a "seniority system." Instead, the en banc court focused on the fact that the lines of progression were instituted in 1968 and held that, even if the lines were considered part of a seniority system, § 703(h) did not apply because the system was established after the effective date of Title VII. (App. 142-45).[7/] The question now before the Court therefore concerns the application of § 703(h) to seniority systems or lines of progression which were instituted after July 2, 1965, and which perpetuate prior intentional discrimination.

7/ This issue was not briefed or argued by any party in the district court or before either the panel or the en banc court of appeals.

B. Discriminatory Practices

1. Before 1963: Rigid Segregation

These cases involve employment practices at three interrelated American Tobacco Company facilities in Richmond, Virginia: the "Virginia branch," which manufactures cigarettes; the "Richmond branch," which manufactures pipe tobacco; and the "Richmond office," which maintains accounts and records for both branches. (App. 16-17, 75).[8/] The Virginia branch and the Richmond branch are each divided into two production departments, largely

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8/ The district court held that the company discriminated on the basis of race and sex in filling supervisory positions in the Richmond office (App. 8-9), and the Fourth Circuit affirmed this ruling. (App. 96-97). The company did not challenge this ruling in its second appeal (see App. 125) or in the present petition for certiorari.

along racial lines: the predominantly black prefabrication departments blend and prepare tobacco for further processing, and the predominantly white fabrication departments manufacture the finished products. (App. 18, 34, 75).[9/] The Tobacco Workers Union is the bargaining agent for non-craft hourly production and maintenance employees in both departments of both branches. (App. 17).[10/]

Until 1963, the company and the union maintained an overt policy of job and

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9/ The branches are also racially identifiable. The Richmond branch has a substantially larger percentage of black employees and lower wage rates than the Virginia branch. (App. 34-35).

10/ Other employees are represented by local unions affiliated with the International Brotherhood of Electrical Workers and the International Association of Machinists and Aerospace Workers. (App. 17). Those unions are not parties to this lawsuit.

departmental segregation on the basis of race. As the Fourth Circuit stated:

> Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers International Union, while black employees were represented by Local 216.

(App. 75). Blacks were assigned to the lower paying prefabrication departments, while jobs in fabrication were largely reserved for whites.[11/] Promotions were made on the basis of departmental seniority, and employees could not transfer from one

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11/ White employees held a small number of the best paid jobs in the prefabrication departments (App. 34), while black employees held some low paid manual labor and cleaning jobs in the fabrication departments. (Ex. App. 46-48). Until 1963, there was a separate miscellaneous department at the Virginia branch containing two job classifications held only by blacks: cleaner and elevator operator. (App. 33).

department to another without forfeiting seniority. (App. 75). Job classifications were segregated by sex as well as race. (App. 43-46). The company appointed only white males to supervisory posts. (App. 96).

2. 1963-1968: Continuing Intentional Discrimination

In 1963, under government pressure,[12/] the segregated locals were merged and the departmental seniority system was replaced with a branch seniority system. (App. 75). However, as the district court

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12/ The president of Local 182 testified that "we were informed by the Defense Supply Agency that if we continued to maintain segregated local unions, then the Defense Supply Agency may have to step in and say we will cancel all government contracts with the American Tobacco Company, which if this would have happened would have meant detrimental loss to our membership." (J.A. 202).

and the court of appeals held, intentional discrimination continued. Although the departmental seniority system was no longer in effect at the Virginia branch, blacks were now denied access to better jobs on the basis of unwritten, subjective selection procedures administered by white supervisors. (App. 75-76).[13/] Despite the change in the form of the seniority system, employees with the greatest branch seniority were not promoted to automatic machinery jobs in the fabrication department unless the supervisors determined they were "qualified." (App. 28, 76). Supervisors canvassed employees to determine their interest in potential vacancies.

13/ There were 71 supervisory employees at the Virginia branch in 1969. The number of black supervisors increased from only one in 1963 to only three in 1969. (App. 34).

(App. 28). An employee was deemed "qualified" if he or she "had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it." (App. 28). Since all but a token number of blacks had not been permitted to hold these jobs on either a permanent or a temporary basis[14/] up to that time, very few black employees were deemed "qualified" for these promotions under the procedures instituted in 1963. (Tr. 108-13). Not surprisingly, there was an increase of only four black employees in the fabrication department of

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14/ Prior to 1963, black employees were not permitted to fill temporary vacancies in job classifications restricted to whites. (App. 33). Since 1963, employees in the predominantly black prefabrication departments have generally filled temporary vacancies in those departments, and employees in the predominantly white fabrication departments have generally filled temporary vacancies in those departments. (App. 28).

the Virginia branch between 1963 and 1968. (App. 76).[15/]

At the Richmond branch, the white supervisors[16/] canvassed employees to determine their "interest" in each vacancy. A supervisor then selected the most senior employee deemed by the supervisor to be willing to fill the vacancy. Vacancies were not posted, and there were no written job descriptions. (App. 76). Despite the

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15/ In 1963, 11.8 percent of the employees at the Virginia branch (196 of 1,653 employees) were black. (App. 34). The number of blacks in the fabrication department increased only from 82 in 1963 to 86 in 1968. (Ex. App. 46-47). In both 1963 and 1968, the great majority of black employees in the fabrication department were assigned to manual labor, cleaning, and other non-machine operator jobs. (Ex. App. 46-47).

16/ There were 31 supervisory employees at the Richmond branch in 1973. The first black supervisor was appointed in 1966; the second was not appointed until 1971. (App. 35).

formal change in 1963 from departmental to branch seniority, there was an increase of only six black employees in the fabrication department of the Richmond branch between 1963 and 1968.[17/] Throughout this period, the company also discriminated against female employees at both branches. (App. 93-94).

The continuing discrimination against black and female employees was intentional. The courts below held that, while there was no discrimination in hiring after 1965, it was not until 1968 that the company and

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17/ In 1967, 32.1 percent of the employees at the Richmond branch (79 of 246 employees) were black. (App. 35). The number of blacks in the fabrication department increased only from 6 in 1963 to 12 in 1968. (Ex. App. 48). In both 1963 and 1968, most of the black employees in the fabrication department were assigned to general labor and other non-machine operator jobs. (Ex. App. 48).

the union instituted promotional policies which were fair even in form. (App. 7, 75-76, 114).

3. 1968 and After: The Lines of Progression

On January 15, 1968, the company instituted a posting and bidding system for filling vacancies in the Tobacco Workers bargaining unit. Under this system, vacancies were posted on plant bulletin boards for employee bids. The job was awarded to the bidder with the most branch seniority in the branch containing the vacancy. (App. 21-23). The district court found that this system was fair but that it needed further implementation through the posting of written job descriptions, and the Fourth Circuit affirmed this finding. (App. 8-9, 76-78).

The district court also found that after January 1968 the company and the union engaged in two other discriminatory practices: (1) continuation of the previous practice of maintaining a separate seniority roster for each branch and conditioning inter-branch transfers upon forfeiture of accrued seniority; and (2) institution of lines of progression which perpetuated the effects of the prior intentional discrimination and segregation. (App. 7, 31-32, 76-77). The Fourth Circuit en banc has remanded this case to the district court for further findings concerning the first practice. (App. 145-46). Only the second practice is before this Court.

The lines of progression which are at issue here[18/] were not included in the Jan-

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18/ The nine lines of progression are as follows: (1) packing or making machine

uary 1968 collective bargaining agreement. (See Pl. Ex. 35FF-4). Rather, these lines were established by the company in November 1968 (J.A. 570), and were ratified by the union in 1969. (J.A. 245-47).[19] Two-thirds

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18/ cont'd.

operator or Schmermund boxer operator to learner adjuster; (2) catcher to examiner-making; (3) line searcher-Schmermund boxer to examiner-packing; (4) boiler operator to turbine operator; (5) learner adjuster to adjuster; (6) making or packing adjuster to overhaul adjuster; (7) adjuster helper-prefabrication to adjuster-prefabrication; (8) assistant adt dryer operator to adt dryer operator; (9) assistant textile dryer operator to textile dryer operator. (App. 21-22). The courts below held that the lines leading to adjuster, overhaul adjuster, and adjuster-prefabrication are justified by business necessity and therefore are lawful despite their discriminatory effect on blacks and women. (App. 31-32, 79).

19/ Both the company and the union stipulated in their joint petition for certiorari that, "[s]olely for purposes of this petition, petitioners treat the lines of progression as having come into exis-

of all hourly paid non-craft employees at the two branches hold jobs in the lines of progression.[20/] Each line is composed of

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19/ cont'd.

tence after Title VII's effective date." Pet. at 5 n.5. The majority opinion of the en banc court below stated that the line-of-progression policy was adopted in January 1968. (App. 143). The dissenting opinion questioned whether the record was complete on this factual issue but acknowledged that "the majority holding as to the effect of § 703(h) on the lines of progression within the seniority system is based entirely on the fact that the lines did not exist in 1965." (App. 177). The dissenting judges would have remanded the case for factual findings on the origins of the lines of progression. (App. 161-62).

20/ Each line of progression involves only two or three job classifications. See Company Brief at 4 n.7. However, out of a combined total of 952 hourly paid non-craft employees at the Virginia and Richmond branches, approximately 646 hold jobs in the relatively small number of classifications included in the lines of progression. These 646 employees hold the vast majority of the highest paid jobs at both branches. (Ex. App. 158-62).

traditionally segregated jobs: there are seven white lines of progression[21] and two black lines of progression.[22] The jobs in the white lines pay substantially more than the jobs in the black lines.[23]

21/ The lines leading to learner adjuster, examiner-making, examiner-packing, turbine operator, adjuster, overhaul adjuster, and adjuster-prefabrication are composed of jobs held almost exclusively by whites. In 1968, only one black employee held a top job in any of these lines. (Ex. App. 46-48). By 1973, there was still only one black employee in a top job, but there were 120 white employees in top jobs in these lines of progression. A total of approximately 641 employees held all jobs in these lines in 1973. (Ex. App. 158-62).

22/ The jobs of assistant adt dryer operator, adt dryer operator, assistant textile dryer operator, and textile dryer operator have never been held by white employees. (Ex. App. 171-74). In 1973, a total of five black employees at the Virginia branch held all the jobs in these two lines of progression. (Ex. App. 158-62).

23/ The top jobs in the white lines are among the highest paid hourly production jobs at both branches. The jobs in the black lines pay substantially less. (Ex. App. 155-62).

The great majority of the jobs included in the lines of progression are held by white employees at the top of the wage scale in the fabrication department of the Virginia branch. (App. 78-79).[24/]

When a vacancy occurs in one of the top jobs in a line of progression, only employees who have held a lower job in that line are eligible to bid on the vacancy. (App. 21-22). Among the eligible bidders, promotion is not determined by either seniority in the lower job or seniority in the line of progression; rather, branch seniority controls.[25/] The requirement

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24/ As late as 1973, line-of-progression jobs were held by approximately 585 whites and only 61 blacks. Approximately 619 of these jobs were at the Virginia branch, while only 27 of the jobs were at the Richmond branch. (Ex. App. 158-62).

25/ The company and the union have repeatedly acknowledged that branch seniority is used for advancement within the lines of

of prior service in a job within a line of progression thus operates as a pre-

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25/ cont'd.

progression. For example, in briefs filed in the court of appeals, the company described the operation of the lines of progression in the following terms: "In these lines of progression, only those employees in the job classification immediately below the vacancy may bid. The employee with the greatest plant-wide [i.e., branch] seniority receives the promotion." Joint Brief of American Tobacco Co. and American Brands, Inc., Nos.75-1259/1263, at 13. See also id. at 10; Joint Reply Brief of American Tobacco Co.and American Brands, Inc., Nos. 75-1259/1263, at 18 ("employees move through the lines of progression based on plant-wide seniority, not date of entry into the line of progression"); Joint Petition for Rehearing of American Tobacco Co. and American Brands, Inc., Nos. 75-1259/1263, at 10 ("plant-wide seniority is used both to obtain an entry level job in any line of progression and to progress up each line"); Joint Brief of American Tobacco Co., American Brands, Inc., Tobacco Workers International Union, and Local 182, TWIU, Nos. 78-1083/1084, at 7 ("[w]ithin the line, only those employees in the job classification immediately below a vacancy could bid, although plant-wide seniority

requisite for the application of the seniority system. Among the limited number of employees who satisfy this prerequisite and are therefore eligible to bid on a vacancy, branch seniority is applied to determine the successful bidder.

The lines of progression, superimposed on the rigidly segregated employment pattern of the past, denied black and female

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25/ cont'd.

and not seniority within the line controlled"). However, the company and the union have also made the contradictory assertion that, for promotion to a permanent vacancy above the entry level within most lines of progression, job seniority in the immediately preceding job is controlling. Joint Reply of American Tobacco Co., American Brands, Inc., Tobacco Workers International Union, and Local 182, TWIU, to Plaintiffs' Responses to Petition for Rehearing, Nos. 78-1083/1084, at 4-5. While finding "considerable support" for the position that branch seniority is used for advancement within the lines of progression, the en banc majority below concluded that the record is ambiguous on this question. (App. 142-43 n.3).

employees the opportunity to advance to traditionally white male jobs. The intentionally discriminatory policy of promotions based on subjective supervisory determinations of "interest" and "qualifications," which had replaced overt job and departmental segregation in 1963, was in turn replaced in 1968 by the lines of progression. Blacks who were previously excluded from white jobs on the basis of race now were told that, because they had not held these jobs in the past, they would not be permitted to move up to higher paying white jobs in the new lines of progression. (App. 78-79). Women were similarly denied equal access to male jobs. (App. 93). The district court accordingly found that the lines of progression perpetuated past discrimination on the basis of race and sex. (App. 31-32). While three of the

lines were justified by business necessity and therefore were upheld despite their perpetuation of past discrimination,[26] the remaining lines were not supported by any adequate business justification and were unlawful. (App. 31-32). As the Fourth Circuit stated in affirming these findings:

> Most of these jobs [in the lines of progression] were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its

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26/ The court held that the lines leading to adjuster, overhaul adjuster, and adjuster-prefabrication were justified by business necessity. (App. 31-32). In 1973, the top jobs in these lines were held by 80 employees, all of whom were white. (Ex. App. 158-62).

> evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity. For the others, alternative means such as on-the-job training are available to provide competent workers.

(App. 78-79) (footnote omitted).

The record provides ample support for these findings. By 1973 -- five years after the lines of progression were instituted -- rigid segregation of job classifications continued to characterize both branches. (App. 78). Whites still held all but one of 121 jobs at the top of the seven white lines of progression; the lone exception was a single black learner adjuster. (Ex. App. 158-62). White employees also continued to dominate the lower jobs in these lines: whites held approximately 465 of these jobs, while blacks held only 55. (Ex. App. 158-62). Moreover, of

approximately 200 hourly paid non-craft job classifications at the Virginia branch, 18 had never been held by whites and 10 had never been held by blacks. Of approximately 43 such classifications at the Richmond branch, 21 had never been held by whites and nine had never been held by blacks. (App. 78). Finally, the prefabrication department at the Virginia branch remained more than 80 percent black, while the fabrication department was still 86 percent white. The prefabrication department at the Richmond branch remained 92 percent black, while the fabrication department was 62 percent white. (App. 77). It is therefore clear from the record that the lines of progression and other post-1968 practices perpetuated the overt segregation and intentional discrimination of the past.

SUMMARY OF THE ARGUMENT

The historical evidence establishes a longstanding pattern of segregation and discrimination against black workers in the tobacco industry. In keeping with the racial policies of the industry, both the company and the union in this case were operated on a strictly segregated basis until 1963. The system of overt job and departmental segregation was then replaced by a system of intentional discrimination in promotions. Under the guise of evaluating "interest" in vacancies and "qualifications" for promotions, white supervisors restricted black employees to historically black jobs. This intentionally discriminatory promotional system continued until 1968, three years after the effective date of Title VII, when it was replaced by a

system based on lines of progression. The line-of-progression system, superimposed on the pre-existing pattern of rigid segregation and intentional discrimination, has perpetuated the racially exclusionary policies of the past by continuing to deny black workers access to historically white jobs at the top of the pay scale.

The legislative history of Title VII and the prior decisions of this Court establish that § 703(h) was not intended to protect such post-Act systems. Rather, § 703(h) provides a narrow exemption which was specifically designed to protect bona fide seniority systems which were in existence before the effective date of Title VII. Where, as here, an employer and a union have instituted a system after the effective date of Title VII which perpetuates their own prior intentional discrim-

ination, the system is prohibited. This interpretation of Title VII and § 703(h) accords with the fundamental purpose and underlying policies of the Civil Rights Act of 1964.

In addition, the lines of progression are not part of a "seniority system" within the meaning of § 703(h). Instead, the requirement of prior service in a line of progression operates as a prerequisite for eligibility to bid on higher-rated jobs in the line. Satisfaction of this prerequisite is not determined by seniority in any job, or by seniority in the line of progression, or by any other measure of time served in employment. Rather, the mere fact of service in a line-of-progression job determines eligibility for advancement. Among the limited group of employees who satisfy this non-seniority eligibility re-

quirement, branch seniority is applied to determine the successful bidder. Since the line-of-progression requirement is not part of a "seniority system," it is not protected by § 703(h).

ARGUMENT

I. SECTION 703(h) OF TITLE VII DOES NOT AUTHORIZE THE POST-ACT ADOPTION OF SENIORITY SYSTEMS WHICH PERPETUATE INTENTIONAL DISCRIMINATION AND SEGREGATION.

A. Section 703(h) Should Be Read in the Context of the Relevant Legislative Materials, the Prior Decisions of this Court, and the History and Purpose of Title VII.

Section 703(h) of Title VII provides in pertinent part as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to

> apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ... provided that such differences are not the result of an intention to discriminate because of race ....

42 U.S.C. § 2000e-2(h).

Petitioners argue that the "plain language" of the statute applies to post-Act as well as pre-Act seniority systems.[27/] This Court, however, has rejected the simplistic notion that statutory language can have a fixed meaning apart from the context in which it is used. "It is a 'familiar rule, that a thing may be within the letter

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27/ Respondents submit that the lines of progression instituted in 1968 are not a "seniority system" or part of a "seniority system" within the meaning of § 703(h). See Argument II, infra. For the purposes of the present discussion, however, respondents will refer to the lines of progression as a "seniority system."

of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). See also Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944), aff'd sub nom. Gemsco Inc. v. Walling, 324 U.S. 244 (1945).

Thus, "'[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."'" Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940). See Murphy,

Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975); Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947). As Justice Frankfurter stated in analyzing a provision of the National Labor Relations Act:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of the events which they summarize.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-86 (1941).

Section 703(h) must therefore be read "against the background of the legislative history of Title VII and the historical context from which the Act arose." United

Steelworkers v. Weber, 443 U.S. at 201. The relevant aids to the construction of § 703(h) -- the legislative materials concerning the statute, the prior decisions of this Court, and the history and purpose of Title VII -- all demonstrate that, in the circumstances of this case, § 703(h) does not immunize a post-Act seniority system which perpetuates intentional discrimination.[28]

B. The Legislative History of § 703(h), Analyzed in Prior Decisions of this Court, Establishes that the Statute Does Not Exempt Post-Act Seniority Systems which Perpetuate Intentional Discrimination and Segregation.

Petitioners argue that, in enacting § 703(h), Congress sought to assure that Title VII would "not interfere with job

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28/ Neither Alexander v. Aero Lodge 735, 565 F.2d 1364 (6th Cir.1977), cert. denied,

seniority," 110 Cong. Rec. 5423 (1964) (remarks of Sen. Humphrey), and that it "would not affect seniority at all." Id. at 7207 (remarks of Sen. Clark). See Company Brief at 15-20; Union Brief at 25-27. In relying on these and similar isolated statements in the legislative record, petitioners have proved too much. As this Court held in Franks v. Bowman Transportation Co., 424 U.S. 727 (1976), Title VII does affect seniority rights accrued after the effective date of the Act. The Court

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28/ cont'd.

436 U.S. 946 (1978), nor Hameed v. Iron Workers Local 396, 637 F.2d 506 (8th Cir. 1980), nor any of the other lower court decisions cited by the company (Brief at 25-26 n.32) and the union (Brief at 9 n.5) discusses the relevant legislative materials or the history and purpose of Title VII. Those cases simply do not address the question presented here.

in Franks held that, in enacting § 703(h), Congress did not intend to bar an award of retroactive seniority to the identifiable victims of unlawful discrimination. 424 U.S. at 757-62. To the contrary, such relief ordinarily is required under Title VII, and it may go back as far as the effective date of the Act, notwithstanding its effect of diminishing the seniority rights of other, arguably innocent, employees. Id. at 762-70. See also Teamsters, 431 U.S. at 346-48, 356-57. "'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'" Franks, 424 U.S. at 775, quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

Thus, despite the isolated statements quoted by petitioners, Congress clearly did not intend to enact an impenetrable barrier of protection for all seniority systems. When read in the context of the history and purpose of Title VII, these statements and the other legislative materials concerning § 703(h) demonstrate that Congress did not intend to immunize post-Act seniority systems which perpetuate past intentional discrimination.

As the petitioners appear to concede, there is no indication in the legislative history that Congress directly addressed the question presented by this case. Rather, congressional concern and debate were focused on the question whether "established" or "existing" seniority rights would be affected.

In its opinions in Franks and Team-

sters, this Court extensively reviewed the legislative history of § 703(h). As the Court noted in Franks, the initial bill reported by the House Judiciary Committee, H.R. 7152,[29/] did not contain § 703(h) or any other reference to seniority. 424 U.S. at 759. Although the majority Judiciary Committee report did not mention the subject of seniority, the minority report "charged that [the bill] would destroy existing seniority rights." Teamsters, 431 U.S. at 350 (emphasis added) (footnote omitted). See H.R. Rep. No. 914, 88th Cong., 1st Sess. 65-66, 71 (1963) (minority report). Representative Dowdy, a member of the Judiciary Committee minority, argued on the House floor that the bill would require

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29/ H.R. 7152, 88th Cong., 1st Sess. (1963). See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

revision of "established seniority" rights. 110 Cong. Rec. 2726 (1964).[30] He therefore offered an amendment whose purpose was to "make the seniority system or merit system of hiring an exception to the rule of race, color, creed, and so on, in order that an employer may make a hiring decision or determination based on the merit system or seniority system ...." Id. at 2725.[31]

30/ Other members of the House expressed similar concerns. See 110 Cong. Rec. 2557 (1964) (remarks of Reps. Winstead and Ashmore); id. at 2560 (remarks of Rep. Alger).

31/ The Dowdy amendment provided as follows:

> The provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system; (2) a merit system; (3) a system which predicates its practices upon ability to produce, either in quantity or quality; or (4) a determination based on any factor other than race, color, religion, or national origin.

110 Cong. Rec. 2727-28 (1964).

The Dowdy amendment was defeated without discussion or debate, id. at 2728, and on February 10, 1964, H.R. 7152 passed the House. Id. at 2804-05.

When the bill went to the Senate, it still did not contain § 703(h) or any other reference to seniority systems. Since the bill was not referred to any standing committee but instead went directly to the Senate floor, there is no Senate committee report providing any insight into legislative intent. See Vaas, Legislative History: Title VII, 7 B.C. Ind. & Com. L. Rev. 431, 443-44 (1966) (hereinafter "Vaas"). However, the bill was extensively debated on the floor of the Senate in the course of a prolonged filibuster. The subject of seniority surfaced during this debate. Franks, 424 U.S. at 759. Senate critics of the bill reiterated the fears expressed

by House opponents that Title VII would require preferential hiring of minorities to achieve racial balance, and that the minorities hired would then be given special seniority rights placing them ahead of incumbent whites.[32/] Supporters of the bill responded that Title VII "would not affect" seniority rights,[33/]

32/ For example, Senator Hill of Alabama argued that Title VII "would undermine ... the seniority system" and "would force employers and unions, both, to discriminate, to hire by race ...." 110 Cong. Rec. 486, 487 (1964). He asserted that "[r]acial balance might be required in every position .... Race -- not ability, not seniority, and union contracts notwithstanding -- would be the first criterion -- the exact opposite of what the language of the bill apparently says." Id. at 488. As Senator Hill read the bill, "[n]ondiscrimination is no longer sufficient; preferential treatment is demanded. It is to preferential treatment, as embodied in this bill, that I most vigorously object." Id.

33/ See, e.g., 110 Cong. Rec. 5094 (1964) (remarks of Sen. Humphrey).

but opponents continued to argue that the bill "would destroy existing seniority systems ..." Franks, 424 U.S. at 759 (emphasis added). See also Teamsters, 431 U.S. at 350 and n.33.[34/]

It was in response to these claims that Senator Clark,[35/] on April 8, 1964, introduced into the Congressional Record

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34/ For example, Senator Stennis of Mississippi asserted that Title VII would "require employment on the basis of race, and so forth," and would mandate "[p]referential advance of minorities so as to destroy seniority in employment, civil service and apprenticeship programs ...." 110 Cong. Rec. 7091 (1964).

35/ "Bipartisan captains" were selected for each title of the bill in the Senate. Senators Clark of Pennsylvania and Case of New Jersey were the bipartisan captains responsible for explaining Title VII, defending it, and leading discussion on it during the Senate debate. 110 Cong. Rec. 6528 (1964) (remarks of Sen. Humphrey); Vaas at 444-45. See Teamsters, 431 U.S. at 351 n.35.

three documents containing, inter alia, statements explaining the bill's effect on seniority rights. See Franks, 424 U.S. at 759-61; Teamsters, 431 U.S. at 350-51. "While these statements were made before § 703(h) was added to Title VII, they are authoritative indicators of that section's purpose." Teamsters, 431 U.S. at 352. These statements unequivocally demonstrate that the purpose of § 703(h) was to assure the bill's opponents that Title VII would not require preferential treatment of minorities at the expense of seniority rights existing at the time Title VII took effect.

The first of the three documents introduced by Senator Clark was a statement prepared by the Department of Justice at Senator Clark's request to rebut the argu-

ments made by Senator Hill. 110 Cong. Rec. 7206-07 (1964). See Teamsters, 431 U.S. at 351 n.36. This statement specifically declared that Title VII would not "undermine vested rights of seniority" and would have "no effect on seniority rights existing at the time it takes effect." Id. at 7207 (emphasis added).[36/] The second document was an interpretive memorandum submitted jointly by Senators Clark and Case.

36/ The portion of the Justice Department statement pertinent to seniority reads in full:

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to

Id. at 7212-15. This memorandum stated that Title VII "would have no effect on established seniority rights. Its effect is prospective and not retrospective."

36/ cont'd.

discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employ-

Id. at 7213 (emphasis added).[37/] The third document submitted by Senator Clark was a set of answers to questions posed by Senator Dirksen. Id. at 7215-17. In response

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36/ cont'd.

> ers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 Cong. Rec. 7207 (1964).

37/ The full text of the section of the Clark-Case memorandum pertaining to seniority states:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged -- or indeed, permitted -- to fire whites in order to hire Negroes, or to prefer Negroes

to a question about seniority, Senator Clark stated that "[t]he bill is not retroactive, and it will not require an employer to change existing seniority lists." Id. at 7217 (emphasis added).[38/]

37/ cont'd.

> for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

110 Cong. Rec. 7213 (1964).

38/ Two of the questions and answers pertained to seniority:

> Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first

Following the introduction of these documents into the Record, the filibuster continued. Several weeks later, after a number of informal conferences among the Senate leadership, the House leadership,

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38/ cont'd.

> fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first to be fired and the remaining employees are white?
>
> Answer: Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.
>
> Question: If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
>
> Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists.

110 Cong. Rec. 7217 (1964).

the Attorney General and others, a compromise substitute bill prepared by Senators Mansfield and Dirksen was introduced on the Senate floor. 110 Cong. Rec. 11926, 11930-34 (1964). Franks, 424 U.S. at 760-61. See Vaas at 431, 445-46. The Mansfield-Dirksen proposal was offered as a substitute for the entire bill in an effort to bring an end to the filibuster. See 110 Cong. Rec. 12706-07 (1964). The language of § 703(h) pertaining to seniority appeared in its final form in the substitute bill. Id. at 12813.

One of the principal goals of the compromise substitute bill was to resolve the ambiguities in the House-passed version of H.R. 7152. Teamsters, 431 U.S. at 352. See 110 Cong. Rec. 11935-37 (1964) (remarks of Sen. Dirksen); id. at 12707 (remarks of Sen. Humphrey). "As the debates indicate,

one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights." Teamsters, 431 U.S. at 352 (emphasis added). Senator Humphrey explained that, in resolving this particular ambiguity, § 703(h) "does not narrow application of the title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964). See also id. at 12818-19 (remarks of Sen. Dirksen). There was no further attempt to amend the language of the statute pertaining to seniority systems.[39/] Title VII, including § 703(h), subsequently was passed by both the Senate, id. at 14511, and the House,

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39/ Section 703(h) was amended, however, to provide that it shall not be unlawful "for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to

id. at 15897, and it was signed into law on July 2, 1964, as part of the Civil Rights Act of 1964. Id. at 17783.

Based upon its review of the legislative history in Franks, the Court concluded as follows:

> [W]hatever the exact meaning and scope of § 703(h) in light of its unusual legislative history and the absence of the usual legislative materials, see Vaas, supra, at 457-458, it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act ....

424 U.S. at 761. Justice Powell, joined by

39/ cont'd.

discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h). For a discussion of the legislative history of this amendment, see Griggs v. Duke Power Co., 401 U.S. 424, 434-36 (1971). Following this amendment,

Justice Rehnquist, agreed with the majority that "the 'thrust' of that section is the validation of seniority plans in existence on the effective date of Title VII." Id. at 791 (concurring in part and dissenting in part) (emphasis added); see id. at 780 (Burger, C.J., agreeing generally with Justice Powell).

Similarly, in Teamsters the Court found that Congress was concerned with

> Title VII's impact on existing collectively bargained seniority rights. It is apparent that § 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an ex-

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39/ cont'd.

the seniority provision of § 703(h) was largely ignored in the legislative debates, and the statute was characterized almost exclusively as a provision protecting job-related employment tests. See, e.g., 110 Cong. Rec. 15896 (1964) (remarks of Rep. Celler); id. at 16002 (comparative analysis of House and Senate bills prepared by Rep. McCulloch and introduced by Sen. Dirksen).

> plicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. ...
>
> In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. ... [T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352-53 (emphasis added; citations and footnotes omitted).

Thus, as the Court concluded in both Franks and Teamsters, the legislative history of § 703(h) demonstrates that this

section was designed to protect seniority rights acquired prior to the effective date of Title VII. In United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), the Court extended this protection to the operation of a pre-Act system that perpetuated the effects of a post-Act discriminatory discharge which was not the subject of a timely charge by the discriminatee.[40/] Although the system gave present effect to a past act of discrimination, the employer

> was entitled to treat that past act as lawful after [plaintiff] failed to file a [timely] charge of discrimination .... A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed .... [S]eparately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558.

40/ The Court also applied the Evans holding in Teamsters, 431 U.S. at 348 n.30.

Contrary to the company's assertion (Brief at 22-23), Evans does not read § 703(h) as barring an attack on a system which was adopted after the effective date of Title VII.[41/] Rather, Evans holds that a bona fide seniority system in existence when Title VII took effect may be protected when it perpetuates either pre-Act discrimination (which was not illegal) or post-Act discrimination which was not the subject of a timely charge (and therefore is the legal equivalent of pre-Act discrimination). But "[t]he statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory." 431 U.S. at 560. Evans

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41/ The Fourth Circuit en banc affirmed the district court's application of Evans to this case. (App. 146-47). The petition for certiorari did not present this issue for review.

does not discuss the legislative history of § 703(h), and it says nothing about a seniority system which, although instituted after Title VII made it clear that discriminatory employment practices were illegal, nevertheless perpetuated the effects of past intentional discrimination and had no adequate business justification. Regardless of when that past discrimination occurred, whether before or after the effective date of Title VII, such a system is not protected by § 703(h).[42/]

42/ Petitioners also rely on statements in two later opinions that, "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences," Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977), and that "[s]ignificant freedom must be afforded employers and unions to create differing seniority systems." California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980). However, the issue in Hardison was the extent of an employer's

In sum, the legislative history demonstrates that the language of § 703(h) was designed to incorporate the assurances of Title VII's sponsors that seniority rights accumulated by whites under pre-existing bona fide systems would not be overriden by special seniority rights for minorities. While recognizing that such pre-Act seniority systems may "'operate to freeze the status quo of prior discriminatory employment practices,'" Congress nonetheless "extended a measure of immunity to them." Teamsters, 431 U.S. at 349-50,

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42/ cont'd.

obligation under Title VII to accommodate the religious observances of its employees, 432 U.S. at 66, and the issue in California Brewers was the definition of the term "seniority system" in § 703(h), 444 U.S. at 601. See Argument II, infra. Neither opinion decides or even discusses the question presented here.

quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). However, nothing in the legislative history indicates that Congress had the same solicitude for seniority systems instituted after the effective date of Title VII, when employers and unions were on notice of their legal duty not to discriminate. To the contrary, as this Court held in Franks, Congress intended to override post-Act seniority rights to the extent necessary to provide an effective remedy for discrimination.

C. The Historical Context and the Purpose of Title VII Confirm this Court's Prior Analysis of the Language and Legislative History of § 703(h).

1. The Historical Context: The Lines of Progression Instituted in 1968 Were Superimposed on a Pre-Existing Structure of Intentional Discrimination and Segregation.

The language of Title VII must be read

not only in the context of its legislative history but also in "the historical context from which the Act arose." United Steelworkers v. Weber, 443 U.S. at 201. The historical record undergirding Title VII shows that, for more than a hundred years after the Emancipation Proclamation, the American workplace was marked by deliberate practices designed to restrict black workers to inferior positions and to exclude them altogether from desirable, skilled, high paying jobs.[43/] These practices were

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43/ For a full discussion of the history of blacks in the American workplace, see S. Spero and A. Harris, The Black Worker (1931) (Atheneum ed. 1974). See also G. Myrdal, An American Dilemma at 1079-1124 (1944) (Harper & Row ed. 1962). A thorough discussion of black workers during the period from World War I through World War II is found in R. Weaver, Negro Labor, A National Problem (1946), and of blacks in labor unions in R. Marshall, The Negro and Organized Labor (1965); R. Marshall and V. Briggs, The Negro and Apprenticeship

nowhere more prevalent than in the tobacco industry, in which black employment had its origins in slavery. Both the history of the tobacco industry in the South[44/] and the record in this case[45/] make it clear that the post-Title VII adoption of the "senior-

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43/ cont'd.

(1967); and H. Northrup, Organized Labor and the Negro (1944). For more recent discussions, see H. Hill, Black Labor and the American Legal System: Race, Work and the Law (1977), and W. Gould, Black Workers in White Unions (1977).

44/ For a thorough discussion of the history of blacks in the tobacco industry, see H. Northrup, The Negro in the Tobacco Industry (1970) (hereinafter "Northrup"); G. Starnes and J. Hamm, Some Phases of Labor Relations in Virginia at 36-70 (1934) (hereinafter "Starnes and Hamm"). See also R. Marshall, Labor in the South at 215-17 (1967); H. Northrup, Organized Labor and the Negro at 102-18; S. Spero and A. Harris, The Black Worker at 322-23; Johnson, The Conflict of Caste and Class in an American Industry, 42 Am. J. Soc. 55 (1936).

45/ See pp. 8-27, supra.

ity system" at issue here perpetuated overt racial bars imposed by the company and the union in the past.

Blacks have worked in the tobacco industry since its inception in colonial Virginia. H. Northrup, The Negro in the Tobacco Industry at 1 (1970) (hereinafter "Northrup"); G. Starnes and J. Hamm, Some Phases of Labor Relations in Virginia at 37-39 (1934) (hereinafter "Starnes and Hamm"). Through the first half the 19th century, when tobacco manufacturing was concentrated in Virginia and North Carolina, the industry's labor force was composed almost exclusively of black slaves. Northrup at 2; Starnes and Hamm at 37; Johnson, The Conflict of Caste and Class in an American Industry, 42 Am. J. Soc. 55, 56-57 (1936) (hereinafter "Johnson"). During this period, Richmond, Virginia, was

the center of the "slave for hire" market, in which masters hired their slaves out to the tobacco manufacturers. Northrup at 18-19. See also Starnes and Hamm at 37-39.

For two decades after the Civil War, blacks continued to hold most of the non-supervisory jobs in tobacco factories. In the 1880s, however, when cigarette machines were introduced, the companies began to remove black hand rollers from fabrication jobs and replaced them with white machine operators, most of whom were women. White males were hired as mechanics and set-up men. Blacks remained in the prefabrication jobs, and white males remained in the supervisory and white collar jobs. Northrup at 3, 21-22; Johnson, 42 Am. J. Soc. at 60. See Starnes and Hamm at 62. By 1900, the number of black workers had been substantially reduced, and the rigid pattern of

segregation which thereafter characterized the industry was firmly in place. Northrup at 21. This pattern included not only occupational but also physical segregation: blacks were confined to the lowest paying jobs with the poorest working conditions, usually in separate buildings or at least on separate floors from the white departments. Id. at 3-5, 22; Johnson, 42 Am. J. Soc. at 59-61.

Blacks continued to hold more than 60 percent of the jobs in the tobacco industry until the 1930s. Northrup at 22-26. See Starnes and Hamm at 36-37, 58-62, 66-67. Then, however, mechanization began to take more and more black jobs. Despite their long seniority in the industry, the displaced black workers were not permitted to move into segregated white jobs. Northrup at 26. According to a contemporary

description of this process,

> The progressive substitution of machinery for hand processes has created new tasks and destroyed old and honorable skills. With each advance in machinery there has been an increase in white male and female labor. Lacking the protection of that caste sentiment which preserved to the Negro jobs in which he once seemed to have some sort of vested interest, these workers have found themselves holding only those jobs which were "secured" to them by low wages, disagreeable dust, and by tasks regarded as too heavy for native-born white Americans.

Johnson, 42 Am. J. Soc. at 58. See also id. at 64-65. Blacks were left with "'the disagreeable, unskilled labor which because of its dusty, dirty and unsanitary character is distasteful to the whites.'" Starnes and Hamm at 37, quoting L. Greene and C. Woodson, The Negro Wage Earner at 285 (1930).

The Tobacco Workers International Union, which has represented employees at most of the major tobacco companies (in-

cluding American Tobacco) since the 1930s, organized racially segregated locals which institutionalized the existing pattern of segregated jobs and facilitated the process of reducing the number of blacks in the work force. Northrup at 33-35; R. Marshall, Labor in the South at 216-17 (1967).[46/] The exclusionary policies of the craft unions operated as an addi-

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46/ "In some areas, such as Durham, there was good cooperation among Negro and white leadership. In Richmond, however, the union movement affiliated with the American Federation of Labor was at first quite antagonistic to Negroes." Northrup at 35. Until it was challenged in 1937 by a rival union, the Tobacco Workers International Union (TWIU) in Richmond did not attempt to organize black workers for 20 years. H. Northrup, Organized Labor and the Negro at 114. Cf. S. Spero and A. Harris, The Black Worker at 322-23. When the TWIU finally sought to represent blacks at the American Tobacco Company's smoking tobacco plant in Richmond, it proposed segregated bargaining units. Northrup, Organized Labor and the Negro at 114-15. The National Labor Relations Board rejected this proposal and certified a single unit for both races.

tional barrier to opportunities for blacks. Northrup at 38.[47] The unions reinforced the segregated pattern established by the employers, and the Tobacco Workers Union "represented its white members well to the detriment of, and at the expense of, its Negro members." Id. at 39. See R. Mar-

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46/ cont'd.

See Matter of American Tobacco Co., 9 NLRB 579 (1938); 10 NLRB 1171 (1939). Nevertheless, the three white locals at American Tobacco's Durham, Reidsville, and Richmond plants thereafter jointly negotiated one collective bargaining agreement with management, while each of the three black locals made separate agreements. Professor Northrup observed in 1944 that, while "the white leaders usually assist the Negroes in their negotiations, ... the co-operation between the white and colored locals in the American Tobacco plants is decidedly limited in scope." Northrup, Organized Labor and the Negro at 113. See also R. Marshall, Labor in the South at 217.

47/ "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 443 U.S. at 198 n.1.

shall, Labor in the South at 216-17. While cigarette employment was expanding in mechanized jobs open almost exclusively to whites, black members of the Tobacco Workers Union were laid off with little or no union opposition and were replaced by machines operated by whites. Northrup at 39. As a result of this process, black workers -- who had monopolized employment in the tobacco industry from colonial times to the late 19th century, and who had then held a clear majority of the industry's jobs until the 1930s -- found in 1960 that they held only 25 percent of the jobs. Their sharply reduced share of the jobs, moreover, continued to be rigidly segregated. Id. at 33. Government pressure in the 1960s brought about some changes in overt segregationist policies, but by that time the continuing impact of automation and the declining demand for tobacco

products had severely limited job opportunities in the industry. Id. at 40-41.[48/]

In the seminal case of Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), Judge Butzner reviewed the history of segregation and racial discrimination at a typical southern tobacco company and the use of restrictive departmental transfer and seniority practices to perpetuate this history. 279 F. Supp. at 510-14.[49/] The court in Quarles found

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48/ For example, in response to pressure from President Kennedy's Committee on Equal Employment Opportunity to open up all departments to all races, the tobacco companies simply tacked their black seniority lists onto the bottom of the lists for the white departments, and vice versa. Because there were few openings of any kind, this limited change in form resulted in little or no improvement in the substance of black opportunities for upward movement. Northrup at 40-41.

49/ The practices at Philip Morris were essentially the same as those followed by other tobacco manufacturers, Northrup at 78, including the American Tobacco Company, id. at 64-66.

that, although there had been no discrimination in hiring or initial assignment since 1966, restrictive departmental transfer policies -- including forfeiture of accrued departmental seniority rights upon transfer -- imposed "restrictions upon the present opportunities for Negroes result[ing] from the racial pattern of the company's employment practices prior to January 1, 1966." 279 F. Supp. at 513. Based on a review of the legislative history concerning § 703(h) and Title VII's application to pre-Act seniority systems, the court concluded that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." Id. at 516.

The court in Quarles found that the seniority system at Philip Morris had its genesis in the racially discriminatory

employment pattern typical of the tobacco industry, and that present differences in treatment under the system were the result of intentional discrimination against blacks. The court therefore held that the seniority system was not a bona fide system protected by § 703(h). Id. at 516-18. Since the system perpetuated past discrimination and was not justified by business necessity, it violated Title VII: "[T]he restrictive departmental transfer and seniority provisions of the collective bargaining agreement are intentional, unlawful employment practices because they are superimposed on a departmental structure that was organized on a racially segregated basis." Id. at 510.[50/]

50/ In Teamsters this Court held that an "otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-

The record in the present case demonstrates that the industry-wide pattern of intentional discrimination and segregation prevailed at American Tobacco's facilities in Richmond. See pp. 8-27, supra. Like the restrictive departmental transfer and seniority provisions in Quarles, the lines of progression in the present case were "superimposed on a departmental structure that was organized on a racially segregated basis." Quarles v. Philip Morris, 279 F. Supp. at 510. The company and the union thus seek to apply § 703(h) to a system

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50/ cont'd.

Act discrimination." 431 U.S. at 353-54. The Court noted, however, that Quarles and the cases that followed it were consistent with Teamsters insofar as they held that "a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." 431 U.S. at 346 n.28.

which they imposed after the effective date of Title VII on their own pre-existing structure of intentional discrimination and segregation. It is within this context, as well as the larger historical context of the racial practices of the tobacco industry as a whole, that the statutory language, the legislative history, and the judicial decisions construing § 703(h) must be considered.

2. The Purpose of Title VII: Section 703(h) Provides a Narrow Exemption from Title VII's Broad Prohibition of Discriminatory Employment Practices.

The Civil Rights Act of 1964 was the first comprehensive federal legislation ever to address the pervasive problem of discrimination against blacks in modern American society. See M. Sovern, Legal Restraints on Racial Discrimination in Em-

ployment 8 (1966). Extensive hearings had focused the attention of Congress on the adverse social and economic consequences of discrimination against blacks in employment and other fields,[51/] and when the House Judiciary Committee issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to eliminate the effects of discrimination against black citizens:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against

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51/ See, e.g., Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2300-03 (1963); Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

> Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
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> * * *
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> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities....
>
> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination....

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2393.

In United Steelworkers v. Weber, this Court reviewed the legislative history and concluded that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil

Rights Act of 1964 was with 'the plight of the Negro in our economy.'" 443 U.S. at 202, quoting 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Congress recognized that blacks were largely relegated to unskilled and semi-skilled jobs, that because of automation the number of such jobs was rapidly decreasing, and that since the 1940s the relative position of the black worker had steadily worsened. Id. This pattern was especially pronounced in the tobacco industry, where black workers were systematically replaced by white-operated machines, with little or no opposition from the white-dominated unions. See pp. 63-68, supra. Congress further recognized that, unless this trend were reversed, the goal of the Civil Rights Act -- "the integration of blacks into the mainstream of American society" -- could not be achieved. 443 U.S. at 202-03. Therefore,

"it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." Id. at 203.

This problem was especially acute in the tobacco industry, see pp. 63-68, supra, and Congress intended to take effective action to correct it. The enactment of Title VII was "triggered by a Nation's concern over centuries of racial injustice and [was] intended to improve the lot of those who had 'been excluded from the American dream for so long'...." United Steelworkers v. Weber, 443 U.S. at 204, quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey). As this Court has

consistently held, "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Franks v. Bowman Transportation Co., 424 U.S. at 763 and cases cited therein. See also County of Washington v. Gunther, 49 U.S.L.W. 4623, 4628 (1981). The sweeping terms of the statutory prohibition of discrimination reflect the congressional purpose: it is unlawful "to fail ... to hire or to discharge ... or otherwise to discriminate ... with respect to ... compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify ... in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status." 42 U.S.C. § 2000e-2(a) (emphasis added). "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." County of Washington v. Gunther, 49 U.S.L.W. at 4628, quoting S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964).

In § 703(h), Congress provided a narrow exemption from this broad prohibition of discriminatory practices. As the Court stated in Teamsters, this provision "does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race....'" 431 U.S. at 353. In California Brewers Association v. Bryant, 444 U.S. 598 (1980), the Court reiterated its view that § 703(h)

must not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures and tests' that disproportionately affect members of those groups that the Act protects." Id. at 608.

The Court's interpretation of § 703(h) thus accords with the longstanding principle of statutory construction that a remedial statute should "be given a liberal interpretation ... [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont & Northern Railroad Co. v. ICC, 286 U.S. 299, 311-12 (1932). See also Group Life and Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 12 (1976); Payton v. Rowe, 391 U.S. 54, 65 (1968). Like the general prohibitions of discrimination contained in

§§ 703(a) and (d), the exception provided by § 703(h) "must ... be read against the background of the legislative history of Title VII and the historical context from which the Act arose," United Steelworkers v. Weber, 443 U.S. at 201, and it must be interpreted in a manner which does not "'bring about an end completely at variance with the purpose of the statute'...." Id. at 202, quoting United States v. Public Utilities Commission, 345 U.S. 295, 315 (1953). In view of the broad approach adopted by Congress, the Court "must ... avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." County of Washington v. Gunther, 49 U.S.L.W. at 4628.

The importance of seniority rights in the modern workplace supports the proper

construction of § 703(h) as a narrow exception which should not be allowed to defeat the fundamental purpose of Title VII. As the Court stated in Franks:

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. ... Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). ... We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." ... "More than any other provision of the collective [-bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms." ...

424 U.S. at 766 (citations omitted). See also Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring

and Promotion, 82 Harv. L. Rev. 1598, 1601-07 (1969).

This Court recognized in Franks that, because seniority rights are so important, the victims of illegal racial discrimination are presumptively entitled to awards of retroactive seniority which will, insofar as possible, restore them to the positions they would have held in the absence of discrimination. Seniority relief therefore may be denied "'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" 424 U.S. at 771, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). For the same reasons, § 703(h) should be interpreted in a manner which, while recognizing the intent of Con-

gress to protect bona fide pre-Act seniority systems from liability, does not undermine the fundamental purposes of Title VII. Section 703(h) was not intended to be an instrument for depriving black workers of the seniority rights which are essential if they are to achieve their rightful place in the mainstream of American society.

D. The Policies Underlying Title VII Support The Conclusion that § 703(h) Does Not Immunize Post-Act Seniority Systems Which Perpetuate Intentional Discrimination and Segregation.

Strong public policies support both collective bargaining and equal employment opportunity. In the National Labor Relations Act, Congress expressed a national labor policy "'encouraging the practice and procedure of collective bargaining.'" Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62

(1975), quoting 29 U.S.C. § 151. In the Civil Rights Act of 1964, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The resolution of a potential conflict between these policies depends upon the intent of Congress as to which policy should prevail in a particular factual context. See Alexander v. Gardner-Denver Co., 415 U.S. at 60 n.21. For example, in Trans World Airlines v. Hardison, where there was no evidence of past discrimination that required a remedy, the Court determined that the policies supporting both collective bargaining and equal opportunity weighed against the abrogation of the seniority rights of some employees

in order to accommodate the religious needs of others. 432 U.S. at 79 n.12. On the other hand, in Franks v. Bowman Transportation Co., the Court concluded that the congressional policies outlawing discrimination and requiring a "make whole" remedy outweighed the policy favoring collective bargaining. The Court held that, under Title VII, the victims of unlawful discrimination ordinarily are entitled to retroactive seniority even though such relief diminishes the collectively bargained seniority rights of other, arguably innocent, employees. 424 U.S. at 763-66, 773-79.

In the factual and historical context presented here, the congressional policy requiring equal employment opportunity outweighs any policy which might be served by authorizing employers and unions to adopt new seniority systems which

have no business justification and which perpetuate their own intentional discrimination.

American Tobacco's Richmond and Virginia branches were operated on a strictly segregated basis until 1963. As in the rest of the industry, blacks were assigned to the prefabrication departments, while fabrication department jobs, which paid higher wages and had better working conditions, were reserved for whites. See pp. 8-11, supra. Although this system of overt segregation was modified in 1963, racially motivated discrimination continued. Until 1968, black employees were excluded from white jobs by means of intentionally discriminatory promotional policies. Under the guise of evaluating "interest" in vacancies and "qualifications" for promotions, the virtually all-white supervisory force continued to

restrict black employees to the historically "black" jobs. See pp. 11-16, supra.

It was against this background that the company and the union instituted the lines of progression.[52/] Under the new system, when a vacancy occurred in a top job in a line of progression, only employees who had held a lower job in that line were eligible to bid for the vacancy. Regard-

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52/ This case does not present the situation, suggested by the union, of a pre-Act seniority system which might have been protected by § 703(h) but then was modified after the effective date of Title VII in a manner which increased employment opportunities for minorities. Union Brief at 28-29; see Company Brief at 30-31. In the present case, the post-Act line-of-progression system did not replace or modify a pre-existing bona fide seniority system. Instead, it replaced an intentionally discriminatory promotional selection policy which was never protected by § 703(h). Cf. California Brewers Ass'n v. Bryant, 444 U.S. at 608-09. See Argument II, infra. Moreover, the line-of-progression system, far from expanding opportunities for minorities, perpetuated the effects of prior intentional discrimination. See pp. 17-27, supra.

less of their seniority, skill, and ability, employees outside the lines of progression were precluded from bidding for jobs at the top of the lines. The new system, superimposed on the rigidly segregated employment pattern of the past, effectively denied black employees the opportunity to advance to traditionally white jobs. As the Fourth Circuit stated:

> Most of these jobs [in the lines of progression] were in the fabrication departments. Since black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters.

(App. 78-79). See pp. 17-27, supra.

Thus, the system of overt job and departmental segregation was replaced in 1963 by a system of intentional discrimination in promotions, which in turn was replaced in 1968 by the line-of-progression

system. The lines of progression preserved the advantageous position white employees had gained as a result of the prior segregation and intentional discrimination. A combined total of more than 80 percent of the white employees at the Virginia and Richmond branches hold jobs in the seven white lines of progression.[53/] As a result of the prior practices of segregation and discrimination by the company and the union, these white employees are now eligible for promotion to the high paying jobs at the top of the white lines of progression.[54/] Conversely, most black em-

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53/ In 1973, there were 702 white hourly paid, non-craft employees at the Virginia and Richmond branches combined. Approximately 585, or 83 percent, of these white employees held jobs in the seven white lines of progression. (Ex. App. 158-62).

54/ The highest paid hourly non-craft jobs at both branches are at the top of the seven white lines of progression (Ex. App. 155-62).

ployees are now denied access to the top jobs in these lines because they were excluded from the lower jobs in the past on the basis of race. Consequently, by 1973, after the line-of-progression system had been in effect for five years, the top jobs in the historically white lines were held by 120 white employees and by only one black employee. (Ex. App. 158-62).

The case before the Court therefore concerns the post-Act adoption of a line-of-progression system which has perpetuated past intentional discrimination by the employer and union involved. It does not concern the post-Act adoption of a seniority system which has a discriminatory impact on minorities or women for some other reason -- e.g., because women have only recently entered the labor market in certain industries and therefore have accrued little seniority, or because

minorities have only recently moved into the geographical area from which an employer draws its work force and therefore have not been employed as long as most whites. It therefore is unnecessary for the Court to decide whether, in such circumstances, seniority systems adopted after the effective date of Title VII may be protected by § 703(h) despite their discriminatory impact. Such systems arguably may be justified by a "national labor policy encouraging ... free collective bargaining and recognizing the importance, diversity and changing nature of seniority practices." Company Brief at 29; see also Union Brief at 29-31. It is not "national labor policy," however, to encourage employers and unions to adopt new seniority systems which perpetuate their own intentional discrimination against black workers. It manifestly is not

"national labor policy" to condone such conduct where, as here, the new system is not necessary to the safe and efficient operation of the business in question.[55/]

The Court "has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." Franks, 424 U.S. at 778 (footnote omitted) and cases cited therein. Cf. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944). In the present case, as in Franks, the strong public policy interest in terminating the effects

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55/ As noted by the company, the Griggs standard of business necessity is "exacting." Company Brief at 27 n.34. It is not, however, fatal to every seniority system to which it is applied. Indeed, in this very case the district court held that three of the nine lines of progression were justified by business necessity and were therefore lawful despite their discriminatory impact. (App. 31-32).

of racial discrimination is paramount. This policy confirms the conclusion that Congress did not intend to immunize post-Act seniority systems which perpetuate prior intentional discrimination.

Contrary to the company's assertion, in the circumstances of this case there is no conflict whatsoever between the Fourth Circuit's interpretation of § 703(h) and the principles of affirmative action set forth in United Steelworkers v. Weber. Company Brief at 30-32; see Union Brief at 28-29.[56/] The lines of progression es-

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56/ The union hypothesizes a case in which a pre-Act system based on job seniority is converted after the effective date of Title VII to a departmental seniority system. The union argues that such post-Act modifications of seniority systems should not be discouraged because they "would broaden mobility, and thus benefit pre-Act discriminatees...." Union Brief at 28. In the present case, however, the system was not "broadened"; to the contrary, it was narrowed from an ostensible branch-wide

tablished in 1968 were not "designed to break down old patterns of racial segregation and hierarchy," nor were they intended "to eliminate a manifest racial imbalance." Weber, 443 U.S. at 208. To the contrary, the line-of-progression system preserved the favored positions gained by white employees and perpetuated the disadvantages suffered by black employees as a result of decades of overt segregation and intentional discrimination by the company and the union. In effect, the company suggests that, by replacing its

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56/ cont'd.

system to a system which restricted advancement to those within the lines of progression. See pp. 11-27, supra. As is implicit in the union's hypothetical example, the change in the present case was detrimental to the victims of discrimination because it perpetuated the effects of segregated job assignments and intentionally discriminatory promotional policies.

overtly discriminatory system with a facially neutral system which perpetuated the effects of its prior intentional discrimination, it implemented an "affirmative action plan."[57/] In the factual context of this case, the imposition of the unnecessary line-of-progression system is no more deserving of protection from a Title VII challenge than the imposition of a non-job related test or educational requirement for entry into jobs which were

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57/ The company and the union did not argue or present evidence in the courts below that the line-of-progression system was an affirmative action plan. Nor do they describe in their briefs in this Court how the system qualifies as "affirmative action" or, more basically, how the system does not simply perpetuate the effects of intentional discrimination. In Weber the Court stressed "the narrowness of [the] inquiry" regarding affirmative action plans. 443 U.S. at 200. The petitioners' invitation to discuss aspects of affirmative action which are not presented by this case should be declined.

previously reserved for whites. See Griggs v. Duke Power Co., 401 U.S. at 428-33.

The relevant legislative materials, the prior decisions of this Court, and the history and purpose of Title VII all demonstrate that § 703(h) was not intended to immunize post-Act seniority systems which perpetuate intentional discrimination. In the circumstances of this case, the Fourth Circuit correctly held that the policy favoring collectively bargained seniority systems must give way to the paramount policy mandating equal opportunity in employment. Its judgment should be affirmed.

II. THE LINES OF PROGRESSION ARE NOT PART OF A "SENIORITY SYSTEM" WITHIN THE MEANING OF § 703(h).

The narrow exemption provided by § 703(h) applies to "bona fide seniority

... system[s]." 42 U.S.C. § 2000e-2(h). The majority of the panel below held that the lines of progression are not part of a "seniority system" and therefore are not protected by § 703(h). (App. 116). On rehearing, the majority of the en banc court recognized that there was "considerable support" for this "possible alternative basis for decision," but they found it unnecessary to decide the question because of their holding that § 703(h) has no application to post-Title VII seniority systems which perpetuate prior discrimination. (App. 142-43 n.3). The members of the panel majority concurred in this part of the en banc court's opinion but also reaffirmed their prior panel opinion. (App. 155). Respondents submit that this alternative basis for the judgment below is dispositive.

As the Court stated in California Brewers Association v. Bryant, "Title VII does not define the term 'seniority system,' and no comprehensive definition of the phrase emerges from the legislative history of § 703(h)." 444 U.S. at 605 (footnote omitted). The Court, however, has identified certain "core concepts of 'seniority'" as that term is used in § 703(h):

> In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relevant lengths of pertinent employment increase. Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

Id. at 605-06 (footnotes omitted).

As the Court noted in Teamsters, seniority may be "measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression ...." 431 U.S. at 355 n.41. Thus, a system which allocates jobs or benefits on the basis of time served in a line of progression is a "seniority system" which may be protected by § 703(h).[58/] The lines of progression at issue here, however, do not allocate jobs or benefits on the basis of any measure of time served with the employer. To the contrary, these lines insulate the highest paid jobs at both branches from the operation of the

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58/ For a decision applying § 703(h) to a true line-of-progression seniority system, see Myers v. Gilman Paper Co., 25 FEP Cases 468 (S.D. Ga. 1981).

seniority system. When a vacancy occurs in one of the top jobs in a line of progression, only employees who have held a lower job in that line are eligible to bid on the vacancy. (App. 21-22). Length of time served in the line of progression is not a factor. Neither is length of time served in the lower job. Instead, the lines of progression impose a requirement of service in a lower job. This prior service requirement operates as a prerequisite for the application of the seniority system. Among the limited group of employees who satisfy this prerequisite and are therefore eligible to bid on a vacancy, branch seniority is applied to determine the successful bidder. Only the fact of service in the lower job is of any importance; the amount of time served in either the lower job or the line of progression has no effect

whatsoever. See p. 21 n.25, supra.

The lines of progression in the present case therefore have nothing to do with "seniority" as that term was defined in California Brewers. In that case the Court held that a threshold requirement of 45 weeks of service as a temporary employee for entry into a permanent employee seniority track was a component of a "seniority system" within the meaning of § 703(h). The Court stated as follows:

> The 45-week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.
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> Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits.

444 U.S. at 609-10.

Here, by contrast, eligibility to bid on a job at the top of a line of progression has nothing to do with an employee's seniority "in a particular plant, in a department, in a job, or in a line of progression...." Teamsters, 431 U.S. at 355 n.41. Instead, eligibility for promotion is determined by mere service in a lower job classification, without any reference whatsoever to the amount of time served in that classification. In this respect the line-of-progression eligibility requirement is identical to any other non-seniority barrier to advancement, such as an aptitude test or a height requirement. Because such requirements do not "focus ... on length of employment," California Brewers, 444 U.S. at 610, they "depart significantly from commonly accepted concepts of 'seniority.'" Id. at

609. As the Court recognized in California Brewers, such non-seniority requirements are not protected by § 703(h):

> A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703(h) does not mean that the aptitude tests or the height requirements would also be so covered.

444 U.S. at 606 n.13.

Moreover, the eligibility requirements imposed by the lines of progression here "distort the operation of the basic system ...." Id. at 610. Under the basic branch seniority system in the present case, nearly 90 percent of the jobs are now open for bidding by all employees and are

awarded to the senior bidder.[59] The top jobs in the lines of progression are excluded from this system.[60] To exercise his or her seniority in bidding on one of these jobs at the top of the pay scale, an employee must first satisfy the non-seniority eligibility requirement. This requirement is not protected by § 703(h). As the Court cautioned in California Brewers, the exception provided by § 703(h) should not

> be given a scope that risks swallowing up Title VII's other-

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59/ In 1973, there were 952 hourly paid non-craft production jobs at the Richmond and Virginia branches combined. Approximately 828 of these jobs, including the bottom jobs in the lines of progression, are subject to the posting and bidding system, under which vacancies are awarded on the basis of branch seniority. (Ex. App. 158-62).

60/ In 1973, there were 121 employees in jobs at the top of the white lines of progression: 120 whites and one black. There were three black employees in jobs at the top of the black lines. (Ex. App. 158-62).

> wise broad prohibition of "practices, procedures and tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703(h).

444 U.S. at 608-09.

The courts below found that the line-of-progression requirements here, like the high school education requirement and the aptitude tests in Griggs v. Duke Power Co., are artificial and unnecessary barriers to advancement by black and female

employees. (App. 31-32, 78-80).[61] These barriers are "fair in form, but discriminatory in operation," Griggs, 401 U.S. at 431; they "operate to 'freeze' the status quo of prior discriminatory employment practices." Id. at 430. As the Fourth Circuit recognized in the present case, "[s]ince black employees had been largely excluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority." (App. 78-79) (emphasis added). Since the lines of progression are not part of any pre-Act or post-Act "seniority sys-

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61/ The district court found that six of the nine lines of progression were not justified by business necessity and perpetuated the job segregation created by the company's and the union's prior intentional discrimination. (App. 31-32). The Fourth Circuit affirmed this finding (App. 78-80), and this Court denied certiorari. (App. 108).

tem" and therefore cannot be protected by § 703(h), they "fall under the Griggs rationale." Teamsters, 431 U.S. at 349. Accordingly, the courts below correctly concluded that the lines of progression violate Title VII.

CONCLUSION

The judgment of the Fourth Circuit *en banc* should be affirmed.

Respectfully submitted,

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